Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,

Petitioner,

v.

MICHAEL CHERTOFF,
SECRETARY, HOMELAND SECURITY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals for the Federal Circuit erred by ignoring the plain meaning of the Contract Disputes Act (41 U.S.C. § 611) that interest shall be paid on "amounts found due contractors on claims," relying instead on the "strict construction" of waivers of sovereign immunity and an excerpt from the legislative history.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or subsidiaries.

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Norman J. Singer, *Sutherland Statutory Construction* (2001) 11, 12

Cibinic & Nash, *Administration of Government Contracts*, 754 (3d Ed. 1995) 16

Professor Ralph C. Nash, *Interest on Claims: A New Wrinkle*, Nash & Cibinic Report, March 2006 16

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In re Richlin Security Service Company, BCA Nos. 3034 & 3035, 99-1 BCA ¶ 30,219 (DOTBCA 1999) ("Richlin III")

In re Richlin Security Service Company, BCA Nos. 3034 & 3035, 99-2 BCA ¶ 30,562 (DOTBCA 1999) ("Richlin IV")

Richlin Security Service Company v. Rooney, 18 Fed. Appx. 843, 844-45, 2001 WL 744463 (Fed. Cir. 2001) ("Richlin V") (unpublished decision)

In re Richlin Security Service Company, BCA Nos. 3034 & #035, 02-2 BCA ¶ 31,876 (DOTBCA 2002) ("Richlin VI")

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Richlin Security Service Company v. Ridge, 99 Fed. Appx. 906, 204 U.S. App. LEXIS 9433 (May 14, 2004) ("Richlin VIII A")

Richlin Security Service Company v. Ridge, 99 Fed. Appx. 906 (Fed. Cir. 2004) ("Richlin VIIIB") (unpublished decision)

In re Richlin Security Service Company, BCA Nos. 3034 & 3035, 04-2 BCA 32,670 (DOTBCA 2004) ("Richlin IX")

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Richlin Security Service Company, Appellant v. United States Department of Justice, Respondent, DOTBCA No. 3034E & 3035E, 05-2 BCA ¶ 33, 021, (DOTBCA 2005) (The issue of the proper measure of paralegal fees is on appeal to the Federal Circuit).

STATEMENT OF JURISDICTION

The judgment of the court of appeals for the Federal Circuit was entered on January 31, 2006. The judgment of the court of appeals denying a rehearing and en banc review was entered on April 21, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The board of contract appeals, that issued the original decision denying Contract Disputes Act ("CDA") interest ("Richlin IX"), had jurisdiction pursuant to 41 U.S.C. § 607 (d)(2) (1992 and 1999 Supp.). The Federal Circuit, which also denied CDA interest, had jurisdiction over the appeal from the board decision pursuant to 28 U.S.C. § 1295 (a)(10) and 41 U.S.C. § 607(g)(1)(A).

STATUTORY PROVISIONS INVOLVED

The Contract Disputes Act, 41 U.S.C. § 611, reads:

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

STATEMENT OF THE CASE

In April of 1990 and August of 1991, petitioner Richlin Security Service Company ("Richlin") entered into separate contracts to provide security services for the Immigration and Naturalization Service ("INS"). Due to a mutual mistake, the contracts misclassified the guard service level, providing for Guard I services when the correct job classification under the Service Contract Act ("SCA") was Guard II, which caused the resultant underpayment of petitioner's employees. After five years, petitioner filed a claim for reformation of the contract price to the price the parties would have agreed to if they had known that services were to be Guard II.

The Department of Transportation Board of Contract Appeals ("the board") ruled that petitioner was entitled to reformation. However, the board postponed granting a specific amount for the reformation until such time as petitioner's back wage liability was "formalized by appropriate action of the Labor Department". *In re Richlin Sec. Serv. Co.*, 98-1 BCA ¶ 29, 651 (DOTBCA 1997) ("Richlin I"). The Government appealed the board's decision: the Federal Circuit affirmed. *Meissner v. Richlin Security Service Company*, 155 F. 3d 566, 1998 WL228175 (Fed. Cir. 1998) ("Richlin II").

Thereafter, petitioner entered into an agreement with the Labor Department ("DOL") agreeing on the amount of backpay owed each of its employees and agreeing that all funds received from the Government would be put into petitioner's attorney's escrow account. Petitioner's attorney, who was also a party to the DOL-petitioner agreement, was to see to it that the backwages petitioner owed its employees would be paid before any other disbursements were made from the escrow account for any other purpose.

Despite the DOL-Richlin agreement, the board refused to complete the reformation, ruling that petitioner had to *first pay*

its employees before it could be awarded a specific amount of reformation, in order to avoid a possible windfall for the petitioner. *In re Richlin Security Service Company*, BCA Nos. 3034 & 3035, 99-1 BCA ¶ 30,219 (DOTBCA 1999) ("Richlin III") and *In re Richlin Security Service Company*, BCA Nos. 3034 & 3035, 99-2 BCA ¶ 30,562 (DOTBCA 1999) ("Richlin IV"). Petitioner appealed the board's decisions to the Federal Circuit. The court disagreed with the board's conclusion that payment of the reformation might constitute a windfall, noting that "Richlin's subsequent contract with the DOL, including the escrow agreement with Professor Ginsburg, fully addresses the company's concern about a 'windfall'." *Richlin Security Services v. Rooney*, 18 Fed. App. 843, 844–45, 2001 App. LEXIS 15490 (Fed. Cir. 2001) ("Richlin V").

The case was remanded to the board for determination of the amount of reformation. The board denied petitioner reformation in the amount the parties would have agreed to if the true facts were known,[1] Instead, the board simply awarded reformation in the amount of the additional back wages owed to petitioner's employees and the associated payroll taxes and workers compensation insurance premiums, without overhead or profit to petitioner. *In re Richlin Security Service Company*, BCA Nos. 3034 & 3035, 02-2 BCA ¶ 31,876 (DOTBCA 2002) ("Richlin VI") and *In re Richlin Security Service Company*, BCA Nos. 3034 & 3035, 03-1 BCA ¶ 32,301 (DOTBCA 2002) ("Richlin VII"). Petitioner appealed to the Federal Circuit the board's denial of reformation to the price the parties would have agreed to if the true facts were known or, in the alternative, to add overhead and profit to the award of back wages granted by the board. The Federal Circuit affirmed the

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[1] Petitioner sought reformation to the unit price of a follow on contract with the identical Guard II services and the identical SCA wages rates.

board's denial of reformation in any amount in excess of the back wages. *Richlin Security Service Company v. Ridge*, 99 Fed. Appx. 906 (Fed. Cir. 2004) ("Richlin VIIIB").

Thereafter, the amounts awarded by the board were paid into petitioner's attorney's escrow account. However, INS paid into the escrow account *late* the amount of the additional payroll taxes. As a result, the IRS filed a tax lien against Linda Santos, the owner of Richlin. All of the back pay owed was distributed by petitioner's attorney to the employees and the additional payroll taxes were paid to the taxing authorities.

Although Contract Disputes Act ("CDA") interest was ordinarily automatically added to the amount awarded by boards or the U.S. Court of Federal Claims, the Government's attorney asked petitioner's attorney to calculate the amount of CDA interest due and put it into petitioner's quantum request to the board, so that it would be easier for the Government to obtain it if it became necessary to obtain payment from the Judgment Fund (in the U.S. Treasury). Petitioner's attorney did so, requesting the amount of CDA interest payable under the statute (41 U.S.C. § 611). The Government then *opposed* the granting of CDA interest, arguing that CDA interest was not payable in this case.

The board denied CDA interest to petitioner on the reformation amount awarded. *In re Richlin Security Service Company*, BCA Nos. 3034 & 3035, 04-2 BCA 32,670 (DOTBCA 2004) ("Richlin IX"). Petitioner appealed the denial to the Federal Circuit. The Federal Circuit affirmed the board's decision, *Richlin Security Service Company v. Chertoff*, 437 F.3d 1296 (Fed. Cir. 2006) ("Richlin X") and subsequently denied a petition for reconsideration and rehearing en banc. *Richlin Security Service Company v. Chertoff*, 2006 U.S. Appx. LEXIS 12648 (Fed. Cir. April 21, 2006) ("Richlin XI")

SUMMARY OF ARGUMENT

41 U.S.C. § 611 provides that interest shall be paid on "amounts found due contractors on claims" against the U.S. Government. The Federal Circuit panel noted that petitioner had urged it to consider the plain meaning of the words of the statute but refused to do so, focusing instead on the "strict construction" of waivers of sovereign immunity and using the legislative history in spurious support of such a construction. In cases of statutory interpretation, a court must first examine the plain meaning of the text of a statute. If the text is clear and unambiguous, then the judicial inquiry is complete and the court is to enforce the statute as written. The panel's emphasis on the statute's legislative history was unnecessary and misguided. Moreover, the panel's decision regarding the strict construction of the statute yields a meaning that requires a result that is inconsistent with the intent of the lawmakers as expressed in the plain language of the Act.[2] The Federal Circuit's decision in this case has widespread effect, potentially impacting every decision of any board of contract appeals.

ARGUMENT

I. THE FEDERAL CIRCUIT PANEL ESCHEWED THE CARDINAL RULE OF STATUTORY CONSTRUCTION BY ITS REFUSAL TO MAKE THE MANDATORY INITIAL INQUIRY AS TO THE PLAIN MEANING OF THE WORDS OF SECTION 611

The CDA interest provision is short and to the point:

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[2] Finally, contrary to the Federal Circuit's decision in *Raytheon v. White*, 305 F.3d 1354 (Fed. Cir. 2002), the panel erroneously equated "costs incurred" with "costs paid." However, petitioner is not raising this as a ground for its petition for certiorari.

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim . . . from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury. . .

41 U.S.C. § 611. The provision is complete and can be read and understood standing alone because it addresses each of the four elements that make up any obligation to pay interest: (1) the obligation itself, i.e., "interest shall be paid to the contractor"; (2) the principal, i.e., "amounts found due on contractor claims"; (3) the rate, i.e., "the rate established by the Secretary of the Treasury" and (4) time, i.e., "from the date the contracting officer receives the claim until payment thereof." The meaning of the provision is plain on its face.

The only issue before the Federal Circuit panel ("the Richlin panel") was "whether interest on the award to Richlin is allowable under" 41 U.S.C. § 611. *Richlin*, 437 F.3d at 1299. The mandatory first task of any court construing a statute is to look at the text of the statute and determine whether that text has a plain meaning. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) ("As in all statutory construction cases, we begin with the language of the statute."). The Richlin panel noted petitioner's argument "that we must apply the plain meaning rule in construing Section 611," but never undertook the task of determining what the plain meaning of the provision might be, applying instead "the well settled principle" that the government does not pay interest on claims in the absence of an express statutory provision" and noting that, even where Congress has explicitly waived sovereign immunity, the

waiver "*must be strictly construed.*"[3] *Richlin*, 437 F.3d 1299, 1301. (emphasis added.)

The panel's refusal to consider as its first order of business whether the plain meaning of the words of Section 611 requires payment of interest to Richlin contravenes the long-standing cardinal canon of statutory interpretation, dispositively enunciated by the Supreme Court some 25 years ago:

> . . . canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that *courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See*, e.g., *United States v. Ron Pair Enterprises, Inc.*, 489 US 235, 241-242, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); *United States v. Goldenberg*, 168 US 95, 102-103, 42 L. Ed. 394, 18 S. Ct. 3 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68, 3 L. Ed. 150 (1810). When the words of a statute are unambiguous then this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 US 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981); *see also Ron Pair Enterprises, supra*, at 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026.

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (emphasis added). *See also United States v. LaBonte*, 520 U.S. 751, 757 (1997) ("[W]e assume that in drafting this

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[3] Justice Scalia has characterized the "rule that waivers of sovereign immunity must be narrowly construed" as one of a group of "certain presumptions and rules of construction that load the dice for or against a particular result." Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, 1997) at 27-28.

legislation, Congress said what it meant."); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent."); *Miccosukee Tribe of Indians of Florida*, 304 F.3d 1076, 1087 (11th Cir. 2002) ("the plain meaning rule still rules statutory construction.")

In light of the Supreme Court's admonition, "stated time and again," that courts must before doing anything else turn to the plain meaning of the words of the statute, the Federal Circuit panel erred in its insistence on first discussing a "well-settled principle" without even considering the plain meaning of Congress when it said in Section 611 that "Interest on amounts found due contractors on claims shall be paid to the contractor . . ." 41 U.S.C. § 611. Had the Richlin panel heeded the Supreme Court's admonition and simply read and applied the provision in accordance with its plain and unambiguous meaning then the panel would have had no choice but to direct award of the required interest to petitioner. Its failure to do so constitutes reversible error.

II. THE RICHLIN PANEL'S DEMOTION OF THE PLAIN MEANING RULE IN FAVOR OF "STRICT CONSTRUCTION" OF WAIVERS OF SOVEREIGN IMMUNITY IS CONTRARY TO THAT COURT'S OWN PRECEDENTS AND THUS RENDERS THE FEDERAL CIRCUIT A COURT DIVIDED AGAINST ITSELF IN MATTERS OF STATUTORY INTERPRETATION

The Richlin panel's refusal to apply or even consider the plain meaning rule in deciding Richlin contravenes the Federal Circuit's own precedents regarding the primacy of that rule in matters of statutory construction. Prior to the panel's decision in *Richlin*, the Federal Circuit repeatedly affirmed its compliance with the Supreme Court's oft-stated direction that

the plain meaning rule still rules statutory construction. *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1110 (Fed. Cir. 2004) ("If the language is clear and fits the case, the plain meaning of the statute generally will be regarded as conclusive."); *Hoechst-Roussel Pharms. v. Lehman*, 109 F.3d 756, 760-61 (Fed. Cir. 1997) (affirming that when the terms of a statute are unambiguous, "judicial inquiry is complete"). The Richlin panel's determined by-passing of the plain meaning of section 611 constitutes a thus far successful attempt to abrogate the primacy of the first rule of statutory construction in favor of the lesser notion of "strict construction" of waivers of sovereign immunity, thereby giving rise to a conflict between Richlin and those Federal Circuit decisions that respect the rule's primacy. This conflict renders the Federal Circuit a court divided against itself and "leaves [interested parties] in a quandary as to how the court will interpret statutory language." *Decisions of the Federal Circuit: Do They Reflect An Understanding Of The Realities Of Government Procurement?*, 20 NO. 6 NASH AND CIBINIC REP. 86, 87 (2006).

This Court should resolve the Federal Circuit's internal conflict so that it will no longer be a court divided and can consistently follow this Court's direction to "turn first to one cardinal canon before all others" and "presume that Congress says in [Section 611] what it means and means in [Section 611] what it says there." *Connecticut Nat'l Bank*, 503 U.S. at 253-54.

III. THE PANEL'S ELEVATION OF "STRICT CONSTRUCTION" OVER THE PLAIN MEANING OF SECTION 611 YIELDS THE ABSURD RESULT OF MONETARY AWARDS TO ENTITIES WHO ARE PARTIES NEITHER TO THE CONTRACT NOR THE DISPUTE

As noted above, the panel never addresses the plain meaning of Section 611 but instead undertakes to apply notions of "strict construction" to Section 611, citing *Fidelity Construction Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir. 1983), cert. denied, 464 U.S. 826 (1983), for the "well settled principle" that "an allowance of interest on a claim . . . requires an explicit waiver of . . . [sovereign] immunity by Congress" and that such a waiver must be "strictly construed." *Richlin*, 437 F.3d at 1299. There is no question that statutes in derogation of sovereignty are to be the subject of strict construction. 3 Norman J. Singer, *Sutherland Statutory Construction*, § 62.1, at 258-261 (2001); *Brown v. United States*, 547 F.2d 71 (8th Cir. 1976) ("It is fundamental that while . . . the sovereign has waived its immunity, no suit can be maintained unless it is in exact compliance with the terms of the statute under which the sovereign has consented to be sued."). However, the concept of 'strict construction' . . . does [not] demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers." *United States v. Moore*, 423 U.S. 122, 145 (1975) (quoting *United States v. Brown*, 333 U.S. 18, 25-26 (1948)); *Dixson v. United States*, 465 U.S. 482, 501 (1984).[4]

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[4] *Dixson* was a criminal case as are the cases cited but the discussions of the correct application of strict construction is generally applicable.

The application of strict construction is subject to other rules of statutory interpretation which may totally negate its use. 3 Norman J. Singer, *Sutherland Statutory Construction*, § 58.1 at 87, § 62.2 at 272-273. ". . . [S]trict construction has a subordinate status to plain meaning." Morell E. Mullins, *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 44 (2000); *see also Sedina, S.P.R.L. v. Imprex Co.*, 473 U.S. 479 (1985) (". . . [t]he strict construction principle is merely a guide to statutory interpretation . . . it only serves as an aid for resolving an ambiguity . . . "). And when statutes are to be strictly construed, they must be read in their entirety so that "each part or section [is] construed with every other part or section so as to produce a harmonious whole." 2A Norman J. Singer, *Sutherland Statutory Construction*, at 154.

In *Fidelity Construction* the contractor urged the Federal Circuit to disregard the certification requirement of the CDA, arguing that "the language of the interest provision is unambiguous in providing for interest on a claim submitted under [41 U.S.C.§ 611] and that the certification requirement is irrelevant." *Fidelity Construction Co.*, 700 F.2d at 1383. Reviewing the CDA in its entirety, the court found that the "entire statutory scheme" contemplates "that certification is not a mere technicality . . . but is an unequivocal prerequisite for a post-CDA claim being considered under the statute." *Fidelity Construction Co.*, 700 F.2d at 1384. Thus the court "strictly construed" the CDA as a whole and found that, while the language of the interest provision is unambiguous standing alone, the provision cannot serve to divorce interest from certification when read in light of the statute in its entirety, stating that "[s]uch a construction cannot possibly stand as against the entire statutory scheme, "which is so obviously to the contrary." *Fidelity Construction Co.*, 700 F.2d at 1383. Unlike the contractor in *Fidelity Construction Co.*, Richlin did not ask the panel to disregard any provision of the CDA,

asking only that the panel apply the plain meaning of the CDA interest provision set out in Section 611. In response, the panel "strictly construed" the provision so as to affirm the board of contract appeals denial of interest to Richlin in Richlin IX, finding that since Richlin did not "actually pay" the back wages and associated taxes it had acted "merely as a conduit", thereby implying that the true award was actually made (through Richlin) to the employees and the taxing authorities. *Richlin*, 437 F.3d at 1299.

The Richlin panel's "strict construction" of § 611 eliminates the contractor from the final step of the adjudicatory process with the result that an award must be made and an amount "found due" to former employees and taxing authorities—entities who are not parties to the contract. Such an outcome is impossible because the scheme of the CDA in its entirety is explicitly geared to granting authority to the contracting officer and conferring jurisdiction on the boards of contract appeals and the courts to make a "monetary award" or to find an amount "due" only to the contractor. 41 U.S.C.§ 601(4) ("The term '*contractor*' means a party to a government contract other than the government"); 41 U.S.C. § 601(a) ("The contracting officer shall . . . furnish a copy of the decision to the *contractor*. The decision shall inform the *contractor* of his rights . . ."); 41 U.S.C. § 606 ("Within 90 days from date of receipt of a contracting officer's decision . . . the *contractor* may appeal such decision to an agency board of contract appeals . . ."); 41 U.S.C. § 607(g) ("The decision of an agency contract appeals board shall be final except that (A) a *contractor* may appeal such decision to the United States Court of Appeals . . ."); 41 U.S.C. § 612 ("Any monetary award to a contractor by an agency board of contract appeals shall be paid promptly . . ."); 41 U.S.C. § 611 ("Interest on amounts found due contractors on claims shall be paid to the *contractor* . . ."). (Emphases in quotes added).

The panel's "strict construction" of the CDA interest provision yields a result that requires a monetary award to entities other than the contractor, a result totally inconsistent with the intent of the lawmakers as manifested by the plain language of the thirteen sections of the CDA read both separately and together. In the words of *Fidelity Construction*, 700 F.2d at 1379, 1384,"Such a construction cannot possibly stand as against the entire statutory scheme, which is so obviously to the contrary."

IV. THE PANEL DECISION SERIOUSLY UNDERMINES THE ESTABLISHED PRINCIPLES AND PRECEDENTS OF THIS COURT AS WELL AS THE FEDERAL CIRCUIT REGARDING "PASS-THROUGH" CLAIMS OF SUBCONTRACTORS AND OTHERS "SPONSORED BY" THE PRIME CONTRACTOR

The Panel decision, in regarding the award as being to entities other than Richlin, also implicates established principles and precedents of the Supreme Court and the Federal Circuit regarding "pass through" claims of subcontractors and other entities. The law has long recognized, that for purposes of the Government's contract liability, the prime contractor is deemed to be the entity that incurs any costs in performance of the prime contractor's obligations, regardless whether those costs are those of the prime contractor, the prime's employees, or subcontractors (or subcontractor employees) at any tier. This stems at least in part from the principle that, except in extraordinary circumstances, there is no "privity" between the government and any entity but the prime contractor. Only the prime contractor may litigate, and be found due money on, a contract claim against the U.S. Government. These principles were enunciated, e.g., by the U.S. Supreme Court in *United States v. Blair*, 321 U.S. 730 (1944):

> Clearly the subcontractor could not recover this claim in a suit against the United States, for there was no express or implied contract between him and the Government, *Merritt v. United States*, 267 U.S. 338. But it does not follow that respondent is barred from suing for this amount. Respondent [the prime contractor] was the only person legally bound to perform his contract with the Government and he had the undoubted right to recover from the Government the contract price ... [for extra work] whether that work was performed personally or through another. This necessarily implies the right to recover extra costs and services wrongfully demanded of respondent under the contract, regardless of whether such costs were incurred or such services were performed personally or through a subcontractor.

Id., at 737.

The U.S. Court of Claims repeatedly followed these principles, holding that the prime contractor not only could present "pass-through" claims, but was the only one that could present such claims because only he had "privity" with the Government. The Court of Claims regularly granted claims of prime contractors for increased expenses of subcontractors even though the primes themselves had not paid the subs. *Pneumatic Gun-Carriage and Power Co. v. United States*, 36 Ct. Cl. 71, 89 (1901) ("We think defendant should answer at this time without waiting for plaintiff to first pay the damages sustained by the subcontractors...."); *George Leary Construction Co. v. Leary*, 63 Ct. Cl. 206, 222 (1927) ("It is easy to forecast the financial ruin of a Government contractor if the rule is to be established that...[the prime] may not recover amounts due from the Government under his contract until he established to the satisfaction of the Government that he has paid his

subcontractor all he owes him."); *Warren Bros. Road Co. v. United States*, 128 Ct. Cl. 48, 83 (1952).

The Federal Circuit has similarly recognized "pass-through" cases pursued by prime contractors when the underlying claims were those of subcontractors. *Transamerica Ins. Corp., Inc. v. United States*, 973 F. 2d 1572 (Fed. Cir. 1992); *Capital Electricity Co. V. United States*, 729 F. 2d 743 (Fed. Cir.1984); *E.R. Mitchell Construction Co. v. Danzig*, 175 F. 3d 1369 (Fed. Cir. 1999).

It is beyond reasonable dispute that Congress did not intend the use of "contractor' in the CDA to alter the long and well established principles that the term, in the context of contract claims against the Government, means the prime contractor or any other person or entity on whose behalf the prime is sponsoring the claim. The legislative history of the CDA contains express approval of the time-honored "sponsorship" rules, saying that "It is expected that the present sponsorship rules would remain in effect." S. Rpt. No. 95-1118, 95th Con., 2d Sess. (1978) at 16, reprinted in 1978 U.S.C.C.A.N. 5235, 5250.

The panel decision casts into doubt the continued viability of "pass through" claims brought by a prime contractor on behalf of its subcontractors and others not in privity with the Government. This issue, also, is of critical importance to the established "law" of Government contracts (*see*, e.g., Cibinic & Nash, *Administration of Government Contracts*, (3rd Ed. 1995), 1255-1257). As Professor Ralph Nash wrote, in the March 2006 issue of the Nash & Cibinic Report, about the *Richlin* panel decision:

> What does this decision do to claims brought by a contractor on behalf of a subcontractor? Generally, such claims are based on the proposition that the contractor will pay the subcontractor if the contractor

> is successful on the claim. In addition, most contractors probably don't actually pay the subcontractor until the money is received from the Government. In such a circumstance, Richlin may deny them interest on the claim.
>
> In sum, we believe Richlin unnecessarily complicates the issue. The plain meaning of the statute is that an amount was found due to the contractor and the Government owed interest on that amount.

INTEREST ON CLAIMS, A New Wrinkle, set forth in Appendix D.

Accordingly, the continued viability of "pass through" claims, presented in the name of the prime contractor without the prime having paid anything to the subcontractor, and the applicability of CDA interest to such claims, is cast into doubt by the panel decision. This is another important reason for granting certiorari in this case.

V. THE PANEL SHOULD NOT HAVE CONSIDERED THE LEGISLATIVE HISTORY OF THE CLEAR AND UNAMBIGUOUS PROVISIONS OF SECTION 611

Where the language of the statute is clear, the legislative history need not and should not be considered. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1935) ("Like other extrinsic aids to construction their use is 'to solve, but not to create an ambiguity.'" (quoting *Hamilton v. Rathbone*, 175 U.S. 414, 421 (1899))); *United States v. Gonzalez*, 520 U.S. 1, 6 (1997) (observing that with a "straightforward statutory command, there is no reason to resort to legislative history"). As argued above, the text of section 611 is clear and unambiguous—"Interest on amounts found due

contractors on claims *shall be paid to the contractor*. . . ." The panel's invocation of the CDA's legislative history was unnecessary.

But the panel's use of legislative history was worse than unnecessary—it was mischievous because it created ambiguity where previously there was none. *Shreveport Grain & Elevator*, 287 U.S. at 83. The panel claims that the legislative history supports the view that interest is allowable only when the contractor has incurred a "cost of money to finance [the] additional work"so that, "[i]n keeping with the purpose of the statute... *the contractor can recover interest only on amounts it actually paid*", noting. that if Richlin had advanced the employees' compensation using money out of its own pocket then it "might have been entitled to interest," *Richlin*, 437 F.3d at 1301. (emphasis added.) The panel thus reads into the text of Section 611 a condition precedent for payment of interest on "amounts found due", which is not there. The panel's use of the legislative history "only muddies the waters" — where the text of Section 611 had one meaning it now has two. *Gonzalez*, 520 U.S. at 6. The panel has replaced clarity with ambiguity. Its action constitutes further grounds for granting this petition for certiorari.

VI. THE FEDERAL CIRCUIT DECISION WILL AFFECT A LARGE NUMBER OF OTHER CASES; INDEED VIRTUALLY ALL BOARD OF CONTRACT APPEALS CASES WILL BE AFFECTED

The CDA interest statute, 41 U.S.C. § 611, provides that CDA interest is to be added to all amounts found due on contractors claims. Thus, whenever a contractor is successful in a litigation at one of the many boards of contract appeals or a Government contract litigation at the U.S. Court of Federal Claims, he would also recover, at least until the Richlin X

decision, CDA interest on the amount awarded. Accordingly, the Federal Circuit decision in question will affect virtually every decision of a board of contract appeals and many decisions of the Court of Federal Claims.

CDA interest is involved in many hundreds of cases each year. Most Government contractors, large and small, are affected by the Federal Circuit's decision in the Richlin X case. The Federal Circuit decision, in failing to apply the plain meaning rule, has cast substantial doubt on the application of CDA interest to judgments on Government contract claims. The wide application of the Federal Circuit decision for which review is being sought in this case is another reason why this Court should grant the writ of certiorari in this case.

STATEMENT OF RELIEF AND CONCLUSION

Since the Federal Circuit's decision has a very wide application to Government contract cases, this Court should select this case for review. And, because the Federal Circuit failed to apply the plain meaning rule to the Contract Disputes Act interest provision, 41 U.S.C. § 611, and instead gave primacy to a rule of "strict construction", the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 20, 2006

APPENDIX

APPENDIX A

United States Court of Appeals for the Federal Circuit

05-1085

RICHLIN SECURITY SERVICE COMPANY,

Appellant,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,

Appellee.

DECIDED: January 31, 2006

Before MAYER, RADER, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

Richlin Security Service Company ("Richlin") appeals from a decision of the Department of Transportation Board of Contract Appeals (the "Board") denying Richlin's claim for $284,193.85 in interest under the Contract Disputes Act, 41 U.S.C. §§ 601 *et. seq.* ("CDA"). *In re Richlin Sec. Servs. Co.*, 04-2 BCA ¶ 32,670 (DOTBCA 2004) ("*Richlin IX*"). We affirm.

BACKGROUND

In April 1990 and August 1991, Richlin and the Immigration and Naturalization Service ("INS") entered into two fixed-price contracts for private security guard services. As a result of a mutual mistake, the contracts misclassified Richlin's employees as "Guard I" rather than "Guard II" under

the wage classification scheme of the Service Contract Act, 41 U.S.C. §§ 351, *et seq.* ("SCA"), resulting in underpayment of Richlin's employees. In February 1995, the Labor Department determined that the employees were entitled to back wages under the SCA. In March 1996, Richlin filed a claim for the back wages (and associated taxes) with the contracting officer. The contracting officer denied Richlin's claim, and Richlin appealed to the Board. In March 1997, the Board granted in part and denied in part Richlin's request for reformation of the contracts, holding that while reformation was the appropriate remedy, the Board would not specify the terms of the reformation until Richlin's back wage liability was "formalized by appropriate action of the Labor Department." *In re Richlin Sec. Serv. Co.*, 98-1 BCA ¶ 29,651 (DOTBCA 1997) ("*Richlin I*"). The Board was concerned that prematurely awarding Richlin the underpaid wages could result in a windfall to Richlin, as the passage of years since Richlin performed the contracts might prevent Richlin from locating and paying all its former employees. The Board thus invited Richlin to petition for completion of the reformation "at such time as any liability of Richlin for back wages becomes liquidated and satisfied." *Id.* We affirmed. *Meissner v. Richlin Sec. Serv. Co.*, 155 F.3d 566, 1998 WL 228175 (Fed. Cir. 1998) ("*Richlin II*") (unpublished table decision).

On September 22, 1998, after a Labor Department audit, Richlin and the Labor Department executed an agreement specifying: (1) that Richlin's employees were owed $636,818.72 in back wages; (2) that the back wages were to be paid into an escrow account administered by Richlin's counsel; (3) that any excess funds were to be remitted to the Labor Department; and (4) that the Labor Department "agrees that, by virtue of the obligations undertaken in this Agreement, the obligations to the former employees of Richlin have been liquidated and satisfied." J.A. at 123. The Board denied

Richlin's request to complete the reformation based on this agreement, holding that the agreement was not "the equivalent of Richlin actually discharging its back wage liability to some or all of its former employees prior to seeking reimbursement . . . ." *In re Richlin Sec. Serv. Co.*, 99-1 BCA ¶ 30,219 (DOTBCA 1999) ("*Richlin III*"). The Board then denied Richlin's motion for reconsideration. *In re Richlin Sec. Serv. Co.*, 99-2 BCA ¶ 30,562 (DOTBCA 1999) ("*Richlin IV*").

We reversed and remanded, noting that "[i]t is not disputed that INS owes Richlin's employees the underpaid wages," and that "Richlin pointed out that its financial condition [was] such that it ha[d] no funds to pay the former employees prior to reimbursement, and thus that the employees will not be paid absent a modification of the decision." *Richlin Sec. Serv. Co. v. Rooney*, 18 Fed. Appx. 843, 844-45, 2001 WL 744463 (Fed. Cir. 2001) ("*Richlin V*") (unpublished decision). We concluded, in the light of Richlin's financial troubles, that it was unnecessary to make Richlin pay its employees before receiving funds from the INS because the terms of the Richlin-Labor agreement "assure[d] that Richlin will receive no benefit from these payments." *Id.*

On remand, the Board awarded Richlin the amount of back wages specified in the Richlin-Labor agreement. *In re Richlin Sec. Serv. Co.*, 02-2 BCA ¶ 31,876 (DOTBCA 2002) ("*Richlin VI*"). The Board t[illegible]n rejected Richlin's claim for additional labor costs because Richlin presented no evidence that it incurred any additional labor costs that were not fully compensated by the unreformed contract price, and because the Labor Department had determined that the amount specified in the Richlin-Labor agreement was the full extent of Richlin's back-wage liability. The Board also held that Richlin was entitled to payroll taxes incurred as a result of distributing the back wages. *In re Richlin Sec. Serv. Co.*, 03-1 BCA ¶ 32,301 (DOTBCA 2002) ("*Richlin VII*"). We affirmed. *Richlin Sec.*

Serv. Co. v. Ridge, 99 Fed. Appx. 906 (Fed. Cir. 2004) ("*Richlin VIII*") (unpublished decision). The escrow agent distributed the back wages, and Richlin subsequently submitted proof of its associated tax liability to the Board. The majority of the taxes incurred as a result of distributing the back wages were paid from the escrow account, and the Board found INS liable for Richlin's remaining tax liability. *Richlin IX*, 04-2 BCA ¶ 32,670. Presumably, INS will deposit the taxes into the escrow account for disbursement to the taxing authorities by the escrow agent.

Richlin requested interest pursuant to the CDA's interest provision, 41 U.S.C. § 611. The Board denied Richlin's request, concluding that "there is nothing upon which interest could accrue" because "[t]he Board's award [in *Richlin VI & VII*] was not an amount found due [Richlin] but was an amount found due [Richlin's] former employees and the taxing authorities," and Richlin "did not advance its own funds to pay" the back wages. *Richlin IX*, 04-2 BCA ¶ 32,670. This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(10) and 41 U.S.C. § 607(g)(1)(A).

DISCUSSION

I

The only issue here is whether interest on the award to Richlin is allowable under section 611. We review the Board's conclusions of law without deference. 41 U.S.C. § 609(b) (2000); *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1371 (Fed. Cir. 1998); *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1338 (Fed. Cir. 2004).

The Supreme Court has long held that "interest cannot be recovered in a suit against the government in the absence of an express waiver of sovereign immunity from an award of interest." *Library of Congress v. Shaw*, 478 U.S. 310, 311

(1986); *see, e.g., United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888) (applying the "well-settled principle, that the United States are not liable to pay interest on claims . . . in the absence of express statutory provision").

This principle is equally applicable to the sovereign immunity waiver in section 611. That section provides

> Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof. The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board.

41 U.S.C. § 611 (2000). We have recognized that "[a]n allowance of interest on a claim against the United States, absent constitutional requirements, requires an *explicit* waiver of sovereign immunity by Congress." *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir. 1983), *cert. denied* 464 U.S. 826 (1983), (*citing United States v. N.Y. Rayon Co.*, 329 U.S. 654, 658-59 (1947)). Such an explicit waiver, where found, must be strictly construed. *Id.* (citing *N.Y. Rayon Co.*, 329 U.S. at 659). We have also recognized that, with respect to section 611, "even a seemingly explicit [waiver] will not be effective if the language used appears too sweeping and contrary to the overall statutory scheme . . . ." *Id.*

We have previously considered the types of awards that may accrue interest under section 611 as "amounts found due contractors." In *Servidone Construction Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991), we addressed the question whether section 611 allowed a contractor to collect interest on an award of an equitable increase in the total contract price when the contractor, at the time the initial claim was filed, had

not yet incurred all the claimed costs, though all costs were subsequently paid by the contractor. Relying on the plain language and legislative history of the statute, we concluded that section 611 "sets a single, red-letter date for interest on all amounts found due by a court *without regard to when the contractor incurred the costs*." *Servidone*, 931 F.2d at 862 (emphasis added). Put simply, we held that interest was available for costs "found due" the contractor, even though payment had not been made by the contractor on the claim date, because the contractor would ultimately be out of pocket for some period of time. *See also Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383 (Fed. Cir. 1998) (relying on *Servidone* to affirm an award of interest on the full amount of an award of increase in the contract price made before the contractor incurred all additional costs necessitating the increase).

We next addressed the issue in *Raytheon Co. v. White*, 305 F.3d 1354 (Fed. Cir. 2002), where a contract to produce missile guidance systems for the Army was terminated for convenience by the government. The contractor filed a convenience termination claim, and the Board awarded the contractor an equitable adjustment to the total contract price plus interest on costs incurred. The Board denied interest on the percentage of the award representing estimated costs to complete. *Raytheon*, 305 F.3d at 1359, 1365. The contractor appealed to this court, challenging the Board's decision not to award interest under section 611 on the award of costs that the contractor would have incurred but for termination of the contract.

While we recognized the principle, established in *Servidone*, that "interest may not be denied merely because costs later found due had not been incurred at the time the claim was filed," *id.* at 1365, we distinguished Raytheon's claim because termination of the contract meant that the contractor would never actually incur the prospective costs.

Observing that "[i]n both *Servidone* and *J.S. Alberici* . . . the contractors completed their contracts and thus *actually incurred the costs upon which interest was later awarded*," *id.* (emphasis added), we affirmed the Board's denial of interest on the prospective costs because "[w]e have never held that section 611 permits interest to accrue on costs that . . . were never actually incurred by the contractor." *Id.*

II

Richlin nevertheless insists that it is entitled to interest. Richlin argues that we must apply the plain-meaning rule in construing section 611, and that the plain meaning of "amounts found due contractors" in section 611 includes any amount (1) for which the contractor was liable and (2) that was "awarded" to a contractor on a CDA claim.[1] We agree that Richlin was obligated by the contract to pay employees the amount required by the Service Contracts Act, and to pay related tax amounts to

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[1] In this connection, Richlin relies on a provision of the Federal Acquisition Regulation ("FAR") that defines "compensation for personal services" to include "all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor." 48 C.F.R. § 31.001 (2003). Richlin asserts that its liability for the back wages under the SCA constituted "accrued" or "deferred" remuneration, and thus "compensation for personal services" that constitutes a cost of the contracts under the FAR. *See* 48 C.F.R. § 31.103(b) (2003) ("the contracting officer shall incorporate the cost principles and procedures in subpart 31.2 . . . in contracts with commercial organizations as the basis for . . . (4) Price revision of fixed-price incentive contracts"); 48 C.F.R. § 31.205-6(h)(1) (2003) (backpay is a form of "compensation for personal services" constituting "a retroactive adjustment of prior years' salaries or wages," and is "unallowable except [that] [p]ayments to employees resulting from underpaid work actually performed are allowable, if required by a negotiated settlement, order, or court decree").

the appropriate tax authorities.[2] If Richlin had advanced those amounts to the employees and the tax authorities pursuant to the contract, Richlin might have been entitled to interest. But that is not what occurred. Richlin did not advance a penny of its own money, and indeed claimed that it lacked the resources to make such advances. Rather, the government paid the amounts awarded into an escrow account, and those funds were used to pay the employees and the tax authorities. On the basis of these facts, the Board denied Richlin's request for interest on the award because Richlin did not actually pay any of the back wages out of pocket. *Richlin IX*, 04-2 BCA ¶ 32,670.

We agree with the Board's conclusion. As we have previously recognized, the legislative history of section 611 establishes that in providing for interest on CDA awards, "Congress was concerned with fully compensating contractors for additional costs incurred in a continuing performance under a contract." *Fidelity Constr. Co.*, 700 F.2d at 1384. The Senate Report accompanying the bill that enacted section 611 explains

> The rights of Government contractors who prevail upon claims against the Government are unique since they have been required by language of the contract . . . to perform the work directed by the Government without stopping to litigate. . . . *Since the contractor has been compelled to perform the work with its own money* – in the total absence of contract payments or progress payments -- there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. *The*

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[2] *See Richlin I*, 98-1 BCA ¶ 29,651 (discussing provisions in the contract that incorporate SCA requirements); 48 C.F.R. § 52.222-41(c)(1) (obligating contractors subject to the SCA to pay wages in accordance with SCA regulations); *Richlin IX*, 04-2 BCA ¶ 32,670 (discussing Richlin's payroll tax liability in detail).

> *cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.*

S. Rep. No. 118, 95th Cong., 2d Sess. 32 (1978) (emphasis added).[3] As the Board recognized, this legislative history supports the view that interest is allowable only when the contractor has incurred a "cost of money to finance [the] additional work."

In keeping with the purpose of the statute, our prior decisions are clear that the contractor can recover interest only on amounts it actually paid. In *Servidone*, we held that interest accrued to all awards representing compensation for costs actually incurred by the contractor, even if not incurred until after the claim was filed, because Congress had adopted a bright-line rule for the computation of interest. *Servidone*, 931 F.2d at 862. But in *Raytheon*, we concluded section 611 did not authorize interest on costs never actually paid by the contractor. *Raytheon*, 305 F.3d at 1365.

The reasoning of *Raytheon* is directly applicable to this case. The award of back wages did not compensate Richlin for any past, present or future out-of-pocket expense. Indeed, Richlin conceded at oral argument that it "was never out any money." The back wages and associated taxes were paid not by

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[3] Contrary to Richlin's contention, the portion of the Senate Report relating to the general purposes of section 611 is not made irrelevant by the fact that the text of the statute was later altered to require that interest accrue from the date the claim is filed with the contracting officer. *See Servidone*, 931 F.2d at 862-63 (describing the alteration). The textual change did not alter the purposes of section 611, and statements of legislative intent related to those purposes remain relevant to interpreting the statute. *Cf. Fidelity Constr. Co.*, 700 F.2d at 1385 (holding irrelevant legislative history specifically related to effect previous version of the altered text).

Richlin but by the government through the escrow mechanism. Richlin acted merely as a conduit, and serving as a conduit did not entitle Richlin to receive interest.

CONCLUSION

For these reasons, the decision of the Board is

AFFIRMED.

COSTS

No costs.

APPENDIX B

Department of Transportation
Board of Contract Appeals
Washington, D.C.

APPEALS OF RICHLIN SECURITY SERVICES CO.
CONTRACT NO. WRO-06-90, WRO-03-91

DOCKET NOS. 3034, 3035

July 22, 2004

OPINION BY ADMINISTRATIVE JUDGE FENNESSY

These appeals were taken from decisions of a contracting officer of the Immigration and Naturalization Service, United States Department of Justice (INS), denying the claims of appellant, Richlin Security Services Co., for the amount of increased wages it owed its employees pursuant to the Service Contract Act. The increased wages were due because of the parties' mutual mistake of misclassifying the positions of appellant's employees at the time of contract formation. The claims have been the subject of numerous decisions by this Board and the Court of Appeals for the Federal Circuit. Familiarity with these earlier opinions is presumed. We provide below a brief summary of the prior proceedings as background for this decision. [*2]

The contract in dispute was for guard services for alien detainees. In our initial decision, we held that reformation of the contract price was appropriate because the parties had mistakenly classified appellant's employees as Guards I rather than as Guards II, which commanded a higher rate of pay. However, we also held that, to prevent bestowing a windfall upon Richlin, the reformation could not be completed until

appellant had liquidated and satisfied its liability for the unpaid wages. *Richlin Security Services Co.*, 98-1 BCA P 29,651 (DOTBCA 1997) (Richlin I). The Court of Appeals affirmed. *Messiner v. Richlin Security Services Co.*, 155 F.3d 566 (Fed. Cir. 1998) (Richlin II).

Thereafter, appellant entered into an agreement with the Department of Labor (DOL) establishing that $636,818.72 was the correct, gross amount of unpaid wages owed to the former employees and that the employees identified in the agreement were the only employees to whom wages were owed. Appellant and DOL also agreed that the INS would make payment of that amount to appellant's counsel, Mr. Gilbert Ginsburg, as escrow agent, for distribution to [*3] appellant's former employees. Alternatively, at the option of DOL, appellant's counsel would transfer the full amount paid by INS directly to DOL for distribution to the former employees. The agreement stated that it liquidated and satisfied appellant's obligations to its former employees. It was signed by a regional wage specialist for DOL, appellant's president, and appellant's counsel as escrow agent.

Following execution of this agreement, appellant requested the Board to complete the reformation. The INS opposed the request arguing that appellant's agreement with DOL did not liquidate and satisfy appellant's obligations to its former employees. The Board agreed with the INS and denied the request to complete the reformation. *Richlin Security Services Co.*, 99-1 BCA P 30,219 (DOTBCA 1999) (Richlin III). Appellant sought reconsideration of the Board's decision relying upon its original arguments. Alternatively, because appellant lacked the funds to pay the increased wages,[1] appellant requested the Board to amend its original decision by

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[1] This allegation had never been raised in any of the Board's earlier proceedings.

eliminating the requirement for appellant to liquidate and satisfy its obligations to former employees in order to [*4] prevent a manifest injustice. The Board denied appellant's request. *Richlin Security Services Co.* 99-2 BCA P 30,562 (DOTBCA 1999) (Richlin IV).

Appellant appealed that decision and placed evidence before the Court of Appeals that appellant could not afford to meet its obligations to its employees without first obtaining the funds from the INS. Based upon that evidence and appellant's contract with DOL, the Court reversed and remanded the Board's decision finding that the DOL contract liquidated and satisfied appellant's obligations. *Richlin Security Services Co. v. Rooney,* 18 Fed. App. 843, 2001 U. S. App. Lexis 15490 (Fed. Cir. 2001) (Richlin V).

On remand, appellant posited three alternative methods for computing the amount by which the contract price should be reformed. Each method resulted in a price increase of approximately $1.5 million inclusive of the $636,818.72 [*5] in wages. However, because appellant wished to distribute the unpaid wages immediately, it requested the Board to make a partial award on quantum in the amount of the $636,818.72, the gross amount due appellant's former employees pursuant to appellant's agreement with DOL. The Board granted appellant's request. *Richlin Security Services Co.,* 02-2 BCA P 31,876 (DOTBCA 2002) (Richlin VI). Thereafter, the Board issued a decision finding that, in addition to gross wages of $636,818.72, an award would be made for payroll taxes and workmen's compensation premiums in the amount for which it may be liable once the unpaid wages were distributed. We denied all other elements of quantum. However, we declined issuing a final decision until appellant could prove the actual amount of payroll taxes and workmen's compensation insurance for which it was liable. *Richlin Security Services, Inc.* 03-2 BCA P 32,302 (DOTBCA 2002). (Richlin VII).

Appellant appealed that decision. The Court of Appeals rejected the appeal and affirmed our decision. *Richlin Security Services v. Ridge,* 2004 WL 1153349 (Fed. Cir. May [*6] 14, 2004). *(Richlin* VIII) Because the wages have now been distributed, we decide the amounts of payroll taxes and workmen's compensation premiums for which the INS is liable. Additionally, we find that appellant is not entitled to interest pursuant to the Contract Disputes Act (CDA).

Workmen's Compensation

The State of California has informed appellant that it no longer has any legal liability to pay workmen's compensation premiums on the unpaid wages. Appellant has admitted this to the Board. Therefore, we find that appellant is not entitled to any amount for workmen's compensation premiums.

Payroll Taxes

After several attempts to support the claimed amount for outstanding payroll taxes, appellant has now put forth with sufficient clarity enough probative evidence to permit the Board to determine the amount due appellant from the INS for appellant's outstanding payroll taxes. Mr. Ginsburg has submitted an affidavit with exhibits explaining the tax calculations.

Appellant claims $67,339.14 in combined unpaid Federal and state payroll taxes based upon the gross amount of wages due appellant's former employees. In order to explain our decision on this issue [*7] it is necessary to set forth the details of the tax liability associated with the wages due appellant's former employees.

As stated above, by our decision in Richlin VI, the Board made a partial award in the gross amount of $636,818.70 to permit Mr. Ginsburg, as escrow agent, to distribute the unpaid wages. When issuing the checks, Mr. Ginsburg withheld

amounts for Federal income tax, the employees' share of Social Security and Medicare taxes, as well as income taxes and disability taxes due the State of California. Because of these withholdings Mr. Ginsburg issued checks to the former employees in the total net amount of $501,936.30. In accordance with Internal Revenue Service Regulations (IRS) he immediately caused the withheld Federal payroll taxes in the amount of $110,264.70 to be deposited with the IRS. That deposit was comprised of $64,197.45 for Federal income tax, $36,833.31 for the employees' share of Social Security tax, and $9,233.94 for the employees' share of Medicare tax. Mr. Ginsburg also made a deposit with the State of California taxing authority consisting of $20,427.31 for state income tax plus $4,190.39 for state disability insurance taxes.

In our subsequent [*8] decision on quantum (Richlin VII), we held that the INS would be liable for payroll taxes and workmen's compensation premiums subject to proof of liability and the actual amount owed. The Board made clear that an additional award for payroll taxes would be allowable based upon the gross amount of payroll checks actually cashed by appellant's former employees.

Mr. Ginsburg was not able to distribute all of the unpaid wages. Some checks were returned and others were not cashed. Appellant submitted a "Partial Final Report" explaining that the gross amount of distributed wages actually was $608,428.60 rather than the $636,818.72 awarded by the Board, leaving a gross undistributed amount of $28,390.10. Appellant also asserted that the INS was liable for $67,339.14 for additional payroll taxes. That sum was calculated using the gross amount of our award rather than the gross amount of distributed wages.

Subsequently, appellant submitted a "Final Report" reconciling Mr. Ginsberg's escrow account; demonstrating that Mr. Ginsburg had transferred the net amount of undistributed

wages in the sum of $26,019.78 to the Department of Labor (DOL);[2] asserting the liability of INS for $67,339.14 [*9] as computed in its "Partial Final Report;" and setting forth calculations for Contract Disputes Act (CDA) interest.

In a Supplemental Submission to the Board, Mr. Ginsburg set forth by affidavit the computations for the asserted amount of unpaid payroll taxes. He explained that because the gross amount of distributed wages was $608,428.60 rather than the $636,818.70, the withholding for Federal taxes from the employees wages should have been $108,092.85 rather than the $110,264.70 actually withheld and deposited with the IRS. He also admitted for the first time that the difference of $2,171.85 "should be and will be deducted from the amount due the internal revenue service." Supplemental Submission Regarding [*10] Appellant's Liability for Payroll Taxes, p. 4.

Similarly, Mr. Ginsburg acknowledged that the withholding of state taxes from the distributed wages was based upon the gross amount of wages reflected in the Board's award. He explained that, while $4,190.39 was deposited with the State of California for disability insurance based upon the gross amount of the Board's award, the correct amount based upon the checks actually cashed by appellant's former employees was $3,953.82. Again, Mr. Ginsburg finally admitted that "the difference of $236.57 should be and will be deducted from the amount of tax to be paid to the State of California." *Id.*

The total amount Mr. Ginsburg now admits should not and will not be paid to the Federal and state taxing authorities is $2,408.42. This sum is the difference between the gross

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[2] Mr. Ginsburg explained in a telephone conference that he transferred to DOL the net amount of undistributed wages rather than the gross amount because the payroll taxes applicable to the undistributed wages had been withheld and were included in the deposits to the Federal and state taxing authorities.

undistributed wages and the net undistributed wages Mr. Ginsburg transferred to DOL. It represents the taxes withheld from the checks that were returned or not cashed. Because $2,408.42 will be subtracted from the amounts to be paid the taxing authorities, we find that appellant is entitled to the sum of $64,930.72 for unpaid payroll taxes based upon the gross amount [*11] of payroll checks actually cashed by appellant's former employees.[3]

This determination is consistent [*12] with amended Federal and state tax forms submitted by appellant. These documents show that the total Federal and state tax liability was $199,813.10 and that appellant has paid combined total of $134,882.40 in taxes. The difference between those sums is $64,930.70.

Interest

Appellant seeks interest in the amount of $284,193.85[4] on the total amount awarded by the Board pursuant to the Contract Disputes Act (CDA). 48 U.S.C. § 601 *et. seq.* The INS objects to the payment of CDA interest upon the grounds that appellant

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[3] After this opinion had already been drafted finding that $64,930.72 was the amount of outstanding payroll taxes owed by the INS, Mr. Ginsburg credited the already paid taxes to appellant's claim and reduced the payroll tax claim to the amount found due by the Board. This concession came in appellant's 7 submission to the Board attempting to explain the payroll tax computation. Inexplicably, in his 6 prior submissions Mr. Ginsburg had failed to credit the already paid taxes to the payroll tax claim despite argument on the issue by the INS and inquiries by the Board. Moreover, Mr. Ginsburg did not make this concession until his third submission to the Board after the Board had issued an order directing appellant to check the payroll tax calculations for accuracy and to explain discrepancies. Appellant's lack of diligence has resulted in an unnecessary expenditure of time and effort by both the INS and the Board.

[4] Appellant calculated interest through June 30, 2003.

never performed any additional work pursuant to the contracts nor advanced any of its own money to satisfy the monetary sum the Board found due appellant's former employees and the taxing authorities. Consequently, the INS contends that there is nothing upon which interest accrued.

The interest provision of the CDA is a waiver of sovereign immunity and must be strictly construed. *Brookfield Construction Co. v. United States,* 661 F.2d 159 (Ct. Cl. 1981). [*13] It provides that

> interest on amounts found due contractors on claims shall be paid to the contractors from the date the contracting officer receives the claim pursuant to Section 605(a) of this title from the contractor until payment thereof.

41 U.S.C. § 611. Appellant contends that this provision is "self-executing" without the Board's "imprimatur." Thus, appellant argues that the Board should not examine the interest provision of the CDA to determine whether, properly interpreted, it applies in this instance.

The courts have previously addressed the applicability of CDA interest to certain CDA claims. In *Servidone Construction Corp. v. United States* 931 F.2d 860 (Fed. Cir. 1991), the contractor submitted a certified claim for increased costs incurred as a result of a differing site condition. The contracting officer denied the claim and Servidone commenced an action in the Claims Court. The court awarded increased costs incurred by Servidone plus interest from the date the contracting officer received the claim.

On appeal, the Government challenged the award of interest on the total amount found due Servidone [*14] upon the ground that, on the date the contracting officer received the claim, Servidone had not yet incurred all of the costs the court

found due. The Court of Appeals held that Servidone was entitled to interest on the total amount found due accruing from the date the contracting officer received the claim even though Servidone had not then incurred some of those costs. The Court explained that the legislative history of the CDA made clear that Congress deliberately established "an objective bright-line standard" for determining when interest should begin to accrue so as to avoid confusion. *Id.* at 863. *Accord, Caldera v. J. S. Alberici Construction Company,* 153 F.3d 1381, 1383 (Fed. Cir. 1998).

In *Raytheon Company v. White,* 305 F.3d 1354 (Fed. Cir. 2002), the Court of Appeals addressed another issue concerning the applicability of CDA interest. In that case, following the termination of a contract, Raytheon filed a claim seeking to increase the total contract price as a result of changes to provide a basis for a later termination claim. The contracting officer issued a decision granting the [*15] claim in part and denying it in part. An appeal to a board of contract appeals followed. One of the matters decided by the board was the amount of prospective costs to complete the contract had it not been terminated. However, although the board awarded interest on the amount found due Raytheon for costs incurred, it did not award interest on the amount determined as prospective costs to complete. Raytheon appealed the adverse portion of the board's decision.

On appeal, Raytheon argued that the board's failure to award interest on the prospective costs contradicted *Servidone Construction Corp. v. United States, supra,* and *Caldera v. J. S. Alberici Construction Co, supra.* While the Court agreed with Raytheon's statement of the holdings in those cases it distinguished Raytheon's situation. The Court observed that in both *Servidone* and *J. S. Alberici*

> the contractors completed their contracts and thus actually incurred the costs upon which interest was later awarded. We have never held that section 611 [of the CDA] permits interest to accrue on costs that, because of the termination of the contract, were never actually [*16] incurred by the contractor.

Raytheon Company v. White, 305 F.3d at 365. The Court explained that the prospective costs to complete did not constitute an amount found due Raytheon; rather, that sum was determined only to help establish how much money, if any, was due Raytheon for termination costs. Any amount ultimately found due Raytheon as termination costs would be subject to the interest provisions of section 611. In other words, the Court held that section 611 of the CDA does not permit a contractor to recover interest on money it never spent.

The decision in *Raytheon* is applicable to the facts of this case. Here, an amount was not "found due" appellant upon which interest could have accrued. The funds upon which appellant seeks to collect interest were "found due" appellant's former employees and the Federal and state taxing authorities. Appellant was not entitled to those funds in accordance with the Service Contract Act clause of the contract. 48 C.F.R. § 52.222-41(k).

One purpose of the CDA interest provision is to compensate contractors for advancing their own funds to perform changed or extra work during contract performance:

> The [*17] rights of Government contractors who prevail on claims against the Government are unique since they have been required by language of the contract, for example, the changes article and the disputes article, to perform the work directed by the Government without stopping to litigate. Thus, Government contractors must perform and then argue

> about the amount of the equitable adjustment at some later time. Since the contractor has been compelled to perform the work with its own money -- in the total absence of contract payments or progress payments–there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. The cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.

S. Rep. No. 95-118, at 32 (1978)

The legislative history of the CDA makes clear that the interest provision was not intended to accrue on money not spent by the contractor:

> . . . we can make clear *we are not intending to recover interest on money that hasn't been spent.* It is simple justice that the contractor who has to remain working [*18] rather than be free to leave, free to stop, but is told to continue and file a claim later – if he spends the money which ultimately turns out to be money for which the Government is responsible and for which the Government should be spending, part of the cost is the cost of money.
>
> *So we are talking about the cost of money he used and not any hypothetical interest.* He either borrowed it or used funds which were worth money because he would have put them in something else that would have given him a return, and he has been deprived of that. And this is one of the gross inequities of the Government contract situation now, that a contractor recovering 3 or 4 or 5 years later a large claim is nowhere near made whole because the cost of money has not been recognized.

Contract Disputes: Hearings on H.R. 664 and Related Bills Before the Subcommittee on Administrative Law and Governmental Relation of the House Committee on the Judiciary, 95th Cong., 1st Sess. 174 (1977) (emphasis added); *Accord* pp. 159, 176.

In this case, there is nothing upon which interest could accrue to appellant. Appellant did not advance its own funds to pay the Guard II wages and associated payroll [*19] taxes. The Board's award was not an amount found due appellant but was an amount found due appellant's former employees and the taxing authorities. The amount the Board found due was not required to be paid to appellant but was paid to an escrow account for distribution. Thus we find that appellant is not entitled to recover interest on the $636,818.72 in unpaid wages owed to appellant's employees or on the $64,930.70 in taxes owed the Federal and state governments.

DECISION

The appeal is granted in part and denied in part. In addition to the $636,818.72 already awarded, the INS is liable for $64,930.70 for appellant's unpaid payroll taxes. All other elements of the claim, including CDA interest, are denied.

Eileen P. Fennessy
Deputy Chief Administrative Judge
Vice Chair

James L. Stern
Chief Administrative Judge
Chair

Jeri Kaylene Somers
Administrative Judge

Date: July 22, 2004

APPENDIX C

UNPUBLISHED

United States Court of Appeals for the Federal Circuit

05-1085

RICHLIN SECURITY SERVICE COMPANY,

Appellant,

v.

MICHAEL CHERTOFF,
SECRETARY OF HOMELAND SECURITY,

Appellee.

April 21, 2006, Decided
April 21, 2006, Filed

OPINION: ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on April 28, 2006.

APPENDIX D

Nash & Cibinic Report
March 2006

Disputes & Litigation
¶ 13

INTEREST ON CLAIMS: A New Wrinkle

By Ralph C. Nash

The U.S. Court of Appeals for the Federal Circuit has just cast a cloud over the interest provision of the Contract Disputes Act, 41 USCA § 611, which provides that interest "on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim." In *Richlin Security Service Co. v. Chertoff*, No. 05-1085, 2006 WL 224026 (Fed. Cir. Jan. 31, 2006) the court ruled that a contractor could not recover interest on a successful claim because it had not actually paid the claim. The contractor had won its CDA claim for misclassification of its employees by the Government under the Service Contract Act, 41 USCA § 351 et seq., resulting in a board decision that the Government owed the contractor the back wages due the employees plus applicable taxes. However, because of the poor financial condition of the contractor, it was unable to pay the employees and the Government had refused to pay in those circumstances. The parties finally agreed that the Government would pay the amount due into an escrow account and the escrow agent would make the payments. The court concluded that in this circumstance, the contractor was acting "merely as a conduit," which did not meet the test of 41 USCA § 611 that interest must be paid on "amounts found due contractors on claims." The court did not discuss whether the term "amounts found due contractors" had the plain meaning that it appears to have but

instead relied on legislative history to reach its ruling. The court stated:

> As we have previously recognized, the legislative history of section 611 establishes that in providing for interest on CDA awards, "Congress was concerned with fully compensating contractors for additional costs incurred in a continuing performance under a contract." *Fidelity Constr. Co.* [*v. U.S.*], 700 F.2d [1379] at 1384 [(Fed. Cir. 1983)]. The Senate Report accompanying the bill that enacted section 611 explains
>
> > The rights of Government contractors who prevail upon claims against the Government are unique since they have been required by language of the contract...to perform the work directed by the Government without stopping to litigate. . . . Since *the contractor has been compelled to perform the work with its own money*–in the total absence of contract payments or progress payments–there can be no equitable adjustment to the contractor until the contractor recovers the entire cost of the additional work. *The cost of money to finance this additional work while pursuing the administrative remedy, normally called interest, is a legitimate cost of performing the additional work.*

S. Rep. No. 118, 95th Cong., 2d Sess. 32 (1978) (emphasis added).

This ruling places a large cloud of uncertainty on § 611. We know from *Servidone Construction Corp. v. U.S.*, 931 F.2d 860 (Fed. Cir. 1991), that interest is due on costs incurred by a

contractor later than the date a CDA claim is filed. See *Interest Under the Contract Disputes Act: It's Not Related to the Incurrence of Costs*, 11 N&CR ¶ 18. Presumably, this means that the contractor could have recovered interest from the date of filing the claim if it paid the back wages and taxes after the final decision holding in its favor (years later). The decision punishes the contractor for not having the financial resources to do so.

What does this decision do to claims brought by a contractor on behalf of a subcontractor? Generally, such claims are based on the proposition that the contractor will only pay the subcontractor if the contractor is successful on the claim. In addition, most contractors probably don't actually pay the subcontractor until the money is received from the Government. In such a circumstance, *Richlin* may deny them interest on the claim. If the contractor pays the subcontractor immediately after the contractor receives the winning decision and receives the check from the Government a month later, will interest then be owed for the full period specified in the statute?

In sum, we believe *Richlin* unnecessarily complicates the issue. The plain meaning of the statute is that an amount was found due to the contractor and the Government owed interest on that amount. RCN

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No. 06–107

IN THE

Supreme Court of the United States

RICHLIN SECURITY SERVICE COMPANY,
Petitioner

v.

MICHAEL CHERTOFF,
Secretary, Homeland Security
Respondent

On Petition For Writ of Certiorari
from the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE HUBZONE CONTRACTORS NATIONAL COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

This brief is submitted by the HUBZone Contractors National Council ("HCNC"), a tax-exempt trade association representing the interests of HUBZone certified small business concerns.[1] Historically Underutilized Business Zones ("HUBZones") are areas of historical poverty, both urban and rural. A certified HUBZone contractor must be a small business concern whose principal place of business is in a HUBZone with at least 35% of its employees living in a HUBZone. The Small Business Administration currently certifies over 13,000 small businesses as HUBZone companies.

The Federal Circuit's decision in *Richlin Security Service Company v. Chertoff*, 437 F.3d 1296 (Fed. Cir. 2006) is of interest and concern to HCNC because it will as a general matter preclude many of its HUBZone business members from being made whole on their valid claims under contracts with the Federal Government. HCNC submits that the Federal Circuit's in *Richlin* will have the unintended consequence of decreasing HUBZone business and likely other small business participation in Federal contracting—an outcome exactly opposite to that sought by Congressional small business policy.

Both parties granted written consent to submission of this brief.

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[1] This brief was authored entirely by counsel for HCNC, although Counsel for Petitioner was consulted as to the facts relevant to Argument II. No other person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of the brief.

SUMMARY OF ARGUMENT

The Federal Circuit's decision holds Richlin to be merely a "conduit" for payment of back wages and associated taxes and insurance premiums hence not an entity entitled to receive interest on its claim pursuant to the provisions of the Contract Disputes Act, 41 U.S.C. §611. This holding is contrary to the established principle that, for purposes of the Government's contract liability, the prime contractor is the only entity that incurs costs. As the prime contractor is the only entity having "privity" with the government under a government contract, the Federal Circuit's holding thus undermines the principle that allows subcontractors to present "pass-through" claims to the government. Further, the decision conflates "costs incurred" with "costs paid", thereby obviating the accepted meanings of "incurred," whose dictionary definition is "to become liable or subject to" and whose accepted meaning in accounting is that a cost is incurred when it becomes a liability, i.e. when one becomes obligated to pay it. Finally, the Federal Circuit decision is inconsistent with Congressional policy encouraging small businesses to participate in Federal contracting both as prime contractors and as subcontractors. The holding will have a chilling effect on small business participation in government contracting by precluding small business contractors with valid claims from recovering interest on costs they have incurred and are obligated to pay but, pending resolution of their claims, have not been able to pay. In addition, the decision's undermining of the "pass-through" principle will limit the ability of small business subcontractors to obtain vindication of their contract rights through the adjudicatory process.

ARGUMENT

I. THE FEDERAL CIRCUIT'S DECISION UNDERMINES THE PRINCIPLE THAT ALLOWS SUBCONTRACTORS AND OTHERS "SPONSORED BY" THE PRIME CONTRACTOR TO RECOVER COSTS

The Federal Circuit treats as a crucial factor whether it was Richlin itself that was "out" the increased wages or "financed" the increase. *Richlin*, 437 F.3d at 1301. For the purposes of the Government's contract liability, however, the prime contractor is deemed to be the entity that incurs any costs in the performance of the prime contractor's obligations, whether the costs are those of the prime contractor, the prime's employees, or its subcontractors. The Supreme Court enunciated this principle over 60 years ago in *United States v. Blair*, 321 U.S. 730 (1944):

> [The prime contractor] was the only person legally bound to perform his contract with the Government and he had the undoubted right to recover from the Government the contract price . . . [for extra work] whether that work was performed personally or through another. This necessarily implies the right to recover extra costs . . . regardless of whether such costs were incurred . . . personally or through a subcontractor.

Id. at 737.

The Federal Circuit's decision deems Richlin to be merely a "conduit," a status which does "not entitle Richlin to receive interest." *Richlin*, 437 F.3d at 1302. This reasoning is contrary to the principle that prime contractors

can present subcontractor "pass-through" claims and are in fact the *only* entities that can do so because only prime contractors have "privity" with the Government. *See Pneumatic Gun-Carriage and Power Co. v. United States*, 36 Ct. Cl. 71, 89 (1901) ("We think defendant should answer at this time without waiting for plaintiff to first pay damages sustained by the subcontractors . . . ."). *George Leary Construction Co. v. Leary*, 63 Ct. Cl. 206 (1927), articulated the rationale for such claims as follows:

> It is easy to forecast the financial ruin of a Government contractor if the rule is established that . . . [the prime contractor] may not recover amounts due from the Government under contract until he established to the satisfaction of the Government that he has paid his subcontractor all he owes him.

Id. at 222.

The Federal Circuit recognizes "pass-through" cases pursued by prime contractors when the underlying claims were those of subcontractors. *See Transamerica Ins. Corp. v. United States*, 973 F.2d 1572, 1580 (Fed. Cir. 1992) (*overruled on other grounds, Reflectone, Inc. v. Dalton* 60 F.3d 1572 (Fed. Cir. 1995)) (holding prime contractor's letter submitting subcontractor's request for equitable adjustment qualified as "claim" under Contract Disputes Act); *Capital Elec. Co. v. United States*, 729 F.2d 743, 745 (Fed. Cir. 1984) (holding prime contractor entitled to recover damages for extended overhead on behalf of subcontractors); *E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369, 1370 (Fed. Cir. 1999) (holding that burden lies with government to prove that prime contractor not responsible for costs incurred by subcontractor in pass-through suit).

The Federal Circuit's decision in *Richlin* casts into doubt the continued viability of "pass through" claims brought by a prime contractor on behalf of its subcontractors and others not in privity with the Government.

II. THE FEDERAL CIRCUIT'S DECISION CONFLATES "COSTS INCURRED" WITH "COSTS PAID"

The Federal Circuit's decision rests in large part on the assertion that "section 611 [does] not authorize interest on costs never actually *paid* by the contractor." *Richlin*, 437 F.3d at 1302. Therefore, the Federal Circuit held that because Richlin could not pay the back wages before it received the funds from the Immigration and Naturalization Service ("INS"), it was not entitled to receive interest on those amounts. *Id.* The court cites *Raytheon Co. v. White*, 305 F.3d 1354 (Fed. Cir. 2002) as the precedent that justifies this conclusion. *Richlin*, 437 F.3d at 1302. The Federal Circuit erred in its application of *Raytheon* because *Raytheon* held that section 611 does not permit interest to accrue on costs that "were never actually *incurred* by the contractor." *Raytheon*, 305 F.3d at 1365. HCNC submits that the Federal Circuit conflated "incurred" with "paid" and overlooked the significant distinction between the two terms.

Raytheon and its predecessor *Servidone Construction Corp. v. United States*, 931 F.2d 860 (Fed. Cir. 1991) both hold that costs must be incurred before interest is payable. *See Raytheon*, 305 F.3d at 1365 (holding that interest is not payable to contractors who never incur any cost); *Servidone*, 931 F.2d at 862 (equating incurred costs with "amounts . . . found due"). Neither decision even mentions "costs paid" or "payment." Thus, the crucial question is whether Richlin incurred costs when it became liable to its employees at the

Guard II wages, not whether Richlin "actually paid" those costs. A cost is incurred when it becomes a liability. *See* MANOS, GOVERNMENT CONTRACT COSTS & PRICING, 116 (Treatise, West, 2004). Merriam-Webster Dictionary defines "incur" as "to become liable or subject to: bring down upon oneself." Black's Law Dictionary defines it as "to suffer or bring on oneself (a liability or expense)."

Did Richlin incur costs? Richlin was awarded "backpay"[2] in its claim against the INS. The Federal Acquisition Regulation ("FAR") classifies "backpay" as a form of "compensation for personal services." 48 C.F.R. § 31.205-6(h)(1). "Compensation for personal services" is "all remuneration paid currently or accrued in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor." *Id.* at § 31.001. When Richlin agreed with the Department of Labor to waive all defenses, it became liable for these compensation costs, which the Board of Contract Appeals eventually determined to be $636,818.72. *In re Richlin Security Service Company*, BCA Nos. 3034 & 3035, 02-2 BCA ¶31,876 (DOTBCA 2002) ("Richlin VI"); *In re Richlin Security Service Company*, BCA Nos. 3034 & 3035, 03-2 BCA ¶ 32,301 (DOTBCA 2002) ("Richlin VII"). Richlin incurred these costs because it became liable for the wages it owed the employees, and it will suffer significant economic loss if interest is not allowed on those payments, when the government's payment to Richlin is delayed.

The reasoning in *Raytheon* is in fact applicable to this case because there the court approved the principle that "once an amount is found due [in the adjudicatory process], it will be subject to the interest provision of Section 611." *Raytheon*, 305 F.3d at 1366. *Raytheon* also holds that

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[2] Called "back wages" or "underpaid wages" in the opinions below. *See Richlin*, 437 F.3d at 1298.

interest accrues on costs "actually incurred" by the contractor whenever they are incurred. *Raytheon*, 303 F.3d at 1365. Again, *Richlin* incurred costs when it became liable to its employees. It follows, under *Raytheon*, that because *Richlin* incurred costs and those costs were found due on an action against the Government, section 611 is applicable and Richlin can recover interest.

III. THE FEDERAL CIRCUIT'S DECISION WILL HAVE A CHILLING EFFECT ON SMALL BUSINESSES' ABILITY TO PARTICIPATE IN THE ADJUDICATORY PROCESS

The Federal Circuit's decision in *Richlin* will as a general matter preclude many of the HUBZone business members of the HCNC from being made whole on their valid claims under contracts with the Federal Government. Second, and more specifically, HCNC is concerned because the Court's fundamental holding in *Richlin* is a straightforward denial of interest on costs a small business contractor or subcontractor has incurred and *is obligated to pay but has not yet paid*:

> In keeping with the purpose of the statute . . . *the contractor can recover interest only on amounts it actually paid.*

Richlin, 437 F.3d at 1301–02.

The holding will preclude HUBZone contractors and other small businesses with valid claims from recovering interest on costs they have incurred and are obligated to pay *but, pending resolution of their claims, have not been able to pay*. The interest costs on such outstanding obligations can

be very significant, particularly for HUBZone and other small businesses. A small business which cannot recover such costs cannot be made economically whole and therefore will have been denied its right to an equitable adjustment under the Changes or other standard clause of its government contract. *Bruce Construction Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963) ("Equitable adjustments . . . are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract.").

Small businesses are "often vulnerable to coercive agency action" and must sometimes turn to the adjudicatory process to obtain vindication of their rights. *Photo Data, Inc. v. Sawyer*, 533 F. Supp. 348, 351 (D.D.C. 1982 (citing H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 9-10, 12, 18, reprinted in (1980) U.S. Code Cong. and Ad. News 4987-89, 4991, 4997). The costs of seeking justice through the adjudicatory process are in many cases prohibitively high for small businesses; precluding them from full recovery of their costs will necessarily decrease both their ability and their motivation to access the process to contest unreasonable agency action. *Cf. Photo Data*, 533 F. Supp. at 350, 351. HCNC believes that HUBZone small businesses will necessarily and inevitably perceive the outcome of the Court's holding to be particularly unfair to their class of enterprise. *See* Ralph C. Nash, *Interest on Claims: A New Wrinkle*, NASH & CIBINIC REPORT, March 2006 at ¶ 13 (observing that the *Richlin* decision "punishes the contractor for not having the financial resources to" to pay the back wages after the final decision entered years after the claim was filed).

As small businesses frequently participate in Federal contracting as subcontractors, the holding's undermining of the "pass-through" principle will further limit the ability of

such businesses to obtain vindication of their rights through the adjudicatory process.

As a result, the holding will have a chilling effect on HUBZone business participation—and likely other small business participation—in programs Congress has created pursuant to a policy of enabling and enhancing their access to Federal contracting opportunities. In sum, HCNC submits that the Panel's decision will have the unintended consequence of decreasing HUBZone business and likely other small business participation in Federal contracting – an outcome exactly opposite to that sought by Congressional small business policy.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court grant the petitioner's writ of certiorari.

Respectfully submitted,

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